Indran a/l N Jeganathan v Nithiyani a/p K Kulaveerasingam

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S8–24–74 OF 2009
SURAYA OTHMAN J
1 MARCH 2010

Civil Procedure — Documents — Without prejudice — Letters exchanged during negotiation of settlement in contemplation of divorce — Whether privileged communication — Whether could be admitted in evidence

The plaintiff and the defendant were married blessed with two children. Following difficulties in their marriage, the plaintiff husband left the matrimonial home. He alleged that the wife denied him access to both children and subsequently filed an originating summons ('encl 1') for, inter alia, guardianship, custody, care and control of the two children and the defendant wife be given visitation rights. In the affidavit in support of encl 1, the husband referred to two 'without prejudice' letters dated 20 November 2008 and 24 December 2008 ('the letters') between solicitors for the husband and the former solicitors for the wife. Unhappy with the inclusion of the said letters the wife filed this application under O 41 r 6 of the Rules of High Court 1980 ('RHC') to expunge and/or strike out the letters and its corresponding paragraphs. The grounds in support of the application were, inter alia, as follows: (a) that the letters formed part of a series of correspondence between the plaintiff's and the defendant's solicitors that contained various settlement proposals and that the negotiation were at all material times carried on a without prejudice basis; (b) that the said letters were 'without prejudice' communications and as such are not admissible evidence; and (c) that the defendant wife had been prejudiced by the inclusion of the said paragraphs and the said letters. The wife subsequently filed an originating summons, inter alia, praying for guardianship, custody, care and control of the two children. Both suits by the husband and wife were heard in tandem.

Held, allowing the application with costs:

(1) The contention that the letters made serious allegation of a quasi criminal nature against the wife was not specific since the amount was not specified and the allegation was without any particularisation and tantamount to nothing more than a mere bare allegation. Taking into account that this was a family matter and the dispute was between a husband and a wife who were contemplating divorce, the allegation by the husband made in the light of negotiation for settlement on the issue of maintenance of the wife under the umbrella of 'without prejudice'

should be considered privileged communication and as such should not be admitted in evidence (see para 38).

(2) Further, from the letters it was clear that the parties were speaking and negotiating freely about all issues related to the terms of settlement for the filing of a joint divorce petition. As such, since the negotiations came to a stalemate, the letters should be protected by the veil of privilege and should not be received in evidence (see para 40).

[Bahasa Malaysia summary

Plaintif dan defendan telah berkahwin dan dikurniakan dua anak. Berikutan kesukaran-kesukaran dalam perkahwinan mereka, plaintif suami meninggalkan kediaman suami isteri. Dia mengatakan bahawa si isteri menafikannya akses kepada kedua-dua anaknya dan kemudiannya memfailkan satu saman pemula ('kandungan 1') untuk, antara lain, penjagaan, jagaan, pemeliharaan dan kawalan kedua-dua anak dan defendan isteri diberi hak lawatan. Dalam afidavit sokongan kandungan 1, si suami merujuk dua surat 'tanpa prejudis' bertarikh 20 November 2008 dan 24 Disember 2008 ('surat-surat tersebut') antara peguamcara pihak suami dan bekas peguam cara pihak isteri. Tidak puas hati dengan kemasukan surat-surat tersebut si isteri memfailkan permohonan ini di bawah A 41 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi memadamkan dan/atau membatalkan surat-surat tersebut dan perenggan-perenggan yang berkaitan. Alasan-alasan menyokong permohonan tersebut adalah, antara lain, seperti berikut: (a) bahawa surat-surat tersebut memjadi sebahagian daripada suatu siri surat menyurat antara peguamcara-peguamcara plaintif dan defendan yang mengandungi pelbagai cadangan penyelesaian dan bahawa rundingan tersebut pada semua masa-masa material dijalankan atas dasar tanpa prejudis; (b) bahawa surat-surat tersebut adalah komunikasi 'tanpa prejudis' dan oleh itu bukan keterangan boleh terima; dan (c) bahawa defendan isteri telah diprejudis oleh kemasukan perenggan-perenggan dan surat-surat tersebut. Si isteri kemudiannya memfailkan satu saman pemula, antara lain, memohonkan bagi penjagaan, pemeliharaan dan kawalan kedua-dua anaknya. Kedua-dua guaman oleh si suami dan si isteri telah didengar bersama-sama.

Diputuskan, membenarkan permohonan dengan kos:

(1) Pengataan bahawa surat-surat tersebut membuat alegasi serius mengenai sifat kuasi jenayah terhadap si isteri tidak spesifik kerana jumlah tersebut tidak dinyatakankan dan alegasi tersebut tidak dibutirkan dan merupakan sesuatu yang tiada lebih daripada pengataan kosong. Mengambil kira bahawa ini ialah satu soal keluarga dan pertikaian adalah antara seorang suami dan seorang isteri yang mempertimbangkan perceraian, dakwaan oleh si suami dibuat mengambilkira halkeadaan rundingan untuk penyelesaian mengenai isu penyenggaraan si isteri di

bawah perlindungan 'tanpa prejudis' seharusnya dianggap komunikasi terlindung dan oleh itu tidak patut dibenarkan masuk dalam keterangan (lihat perenggan 38).

(2) Seterusnya, daripada surat-surat tersebut ia adalah jelas bahawa pihak-pihak bercakap dan berunding secara bebas mengenai semua isu berkaitan dengan syarat-syarat penyelesaian bagi pemfailan satu petisyen perceraian bersama. Oleh itu, memandangkan rundingan-rundingan menjadi buntu, surat-surat tersebut harus dilindungi oleh tirai perlindungan dan tidak seharusnya diterima dalam keterangan (lihat perenggan 40).]

Notes

For a case on documents without prejudice, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2843.

Cases referred to

CE Ling Shipbuilding Sdn Bhd v Hoe Seng Huat Hardware Co (Pte) Ltd [2003] MLJU 775; [2004] 6 CLJ 145, HC (refd)
Cutts v Head and Another [1984] 1 All ER 597, CA (refd)
Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors [1999] 5 MLJ 449, HC (refd)
Field v Commissioner for Railways for New South Wales (1957) 99 CLR 285, HC (refd)
Jinro (HK) International Ltd, Re [2002] 4 HKC 90 (refd)
Kitcat v Sharp (1882) 48 LT 64 (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17, FC (refd)
Rush & Tompkins Ltd v Greater London Council and Anor [1998] AC 1280, HL (refd)
Savings and Investment Bank Ltd v Fincken [2004] 1 All ER 1125, CA (refd)
Tomlin v Standard Telephones and Cables Ltd [1969] 3 All ER 201, CA (refd)

Legislation referred to

Evidence Act 1950 s 23
Rules of the High Court 1980 O 41 r 6

Ebenezer Ramesh Jaya Raj (Kien Fah Yoong with him) (KF Yoong & Co) for the plaintiff husband.
Sharmini Jayan (Jayan & Associates) for the defendant wife.

Suraya Othman J:

INTRODUCTION

[1] This is an application under O 41 r 6 of the Rules of the High Court 1980 ('the RHC 1980') by the defendant wife by way of a summons in

chambers (encl 4) praying to expunge and/or strike out two 'without prejudice' letters contained in the plaintiff's affidavit ('plaintiff's affidavit No 1') affirmed by the plaintiff, Indran a/l N Jeganathan on 8 June 2009 and its corresponding paragraphs in the said affidavit.

[2] The details of the defendant wife's application prayed for are as follows:

(a) that para 15.2.3 and the letter dated 20 November 2008 which is contained in exh 'INJ4' and para 15.2.6 and the letter dated 24 December 2008 which is contained in exh 'INJ4'; both contained in the plaintiff's affidavit No 1, affirmed by Indran a/l N Jeganathan on 8 June 2009 be expunged and/or struck out;

(b) that the plaintiff is ordered to file and serve a new affidavit which does not include and contain those paragraphs as stated in (a) in the above together with the letters as stated in (a) in the above within 14 days from the order of this honourable court;

(c) that all proceedings in this action be stayed while waiting for the filing and service of the new plaintiff's affidavit No 1 referred to in para 2 herein; and

(d) that costs for this application be borne by the plaintiff.

GROUNDS FOR THE APPLICATION

[3] The defendant wife's grounds in support of the application to expunge and/or strike out are as follows:

(a) that the letters dated 20 November 2008 and 24 December 2008 ('said letters') form part of a series of correspondence between the plaintiff's and the defendant's solicitors that contain various settlement proposals and that the negotiation were at all material times carried on a without prejudice basis;

(b) that the said letters are 'without prejudice' communications and as such are not admissible evidence; and

(c) that the defendant wife has been prejudiced by the inclusion of the said paragraphs and the said letters.

FACTS AND BACKGROUND

[4] From the pleadings and evidence adduced by both parties in court, the facts of this case are as follows.

[5] The plaintiff and the defendant were married on the 8 December 1995 and they were blessed with two children, a girl, Raenuga a/p Indran, aged 11 years and a boy, Vishnudev a/l Indran, aged nine years.

[6] The marriage encountered difficulties and the husband left the matrimonial home on 23 November 2007. The husband alleged that the wife has denied him access to both the children.

[7] On 10 Jun 2009, the husband filed an originating summons (encl 1) praying for, inter alia, guardianship, custody, care and control of the two children and the defendant wife be given visitation rights.

[8] In the affidavit in support of encl 1, affirmed by the husband on 8 June 2009, the husband referred to two without prejudice letters ('said letters') between solicitors for the husband, Messrs KF Yoong and the former solicitors for the wife, Messrs Rusmah, Arunan & Associates.

[9] The wife alleged that these said letters form part of a series of correspondence between the plaintiff's and the defendant's solicitors that contained various settlement proposals and that the negotiation were at all material times carried on a without prejudice basis. Since the said letters are 'without prejudice' communications they are as such not admissible evidence.

[10] Unhappy with the inclusion of the said letters which she contended is prejudicial towards her case, the wife filed this application in encl 4, to expunge the said paragraphs and the two without prejudice letters between the solicitors from the plaintiff's affidavit No 1 and in effect from these proceedings.

[11] The wife subsequently filed an originating summons, inter alia, praying for guardianship, custody, care and control of the said two children, vide suit No S8–24–118 of 2009. These two suits by the husband and wife are being heard in tandem.

SUBMISSIONS BY COUNSEL

[12] Counsel for the defendant wife, Ms Sharmini Jayan, submitted that the said letters produced and referred to in the plaintiff husband's affidavit No 1 clearly are without prejudice communications made with the intention to culminate in a settlement of the dispute between the parties. Regretfully, these negotiations did not crystallise into any settlement and the plaintiff husband proceeded to file encl (1) herein.

[13] The defendant's counsel submitted the case of *Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors* [1999] 5 MLJ 449, which stated:

> It is settled law that without prejudice communications are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of negotiation, so that a solution acceptable to both sides can be more easily reached.

[14] Counsel for the defendant further stressed that in *Dusun Desaru Sdn Bhd & Anor* the court held:

> ... the veil of privilege may be waived, but both parties must consent to the waiver.

[15] By referring to this case, Ms Sharmini Jayan argued that in the case at hand, the defendant wife has not consented, nor has she intimated any waiver, express or implied of this privilege. Hence, the plaintiff husband is not entitled to produce the said letters in court as this has clearly embarrassed the wife and runs counter to the basic and fundamental principle of 'without prejudice communication'.

[16] Ms Sharmini Jayan further submitted that this court ought to take cognisance of the fact that the two said letters dated 20 November 2008 and 24 December 2008 contained and exhibited in 'INJ4' of the plaintiff's affidavit No 1 clearly and categorically were made in pursuit of a genuine final settlement which did not actualised, and therefore the plaintiff husband is not entitled to produce these said letters in evidence herein.

[17] In replying to the defendant's submission, the plaintiff husband's counsel, Mr Ebenezer Ramesh Jaya Raj and Mr Kien Fah Yoong contended that the said letter dated 24 December 2008, which is a letter from the wife's then solicitors, Messrs Rusmah, Arunan & Associates had made serious allegations relating directly to the husband's fitness to have custody and access to the children, which must be of paramount concern to this court. Thus according to Mr Ebenezer Ramesh, the wife had abused the 'without prejudice' rule to make the purported shocking allegation in this letter.

[18] As regard to the letter dated 20 November 2008, which is a letter from the husband's solicitors to the wife's then solicitors, Mr Ebenezer Ramesh submitted that the letter made serious allegations of a quasi-criminal nature against the wife, inter alia, that the wife had converted for her personal use trust monies entrusted by the husband to the wife. Mr Ebenezer Ramesh argued that neither the husband nor his solicitors' objected to the inclusion of this letter. Therefore, the wife has no right in law to object to the inclusion of the letter.

[19] Mr Ebenezer Ramesh further submitted that the said letters do not constitute 'negotiations genuinely aimed at settlement' because none of the plaintiff husband's proposals contained in the letter dated 20 November 2009 was accepted by the defendant wife's letter dated 24 December 2008.

[20] Mr Ebenezer Ramesh referred to the case of *Rush & Tompkins Ltd v Greater London Council and Anor* [1998] AC 1280 where the House of Lords held as follows:

> The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon public policy to encouraging litigant to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch 290 at p 306:
>
> ... the rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.

[21] Mr Ebenezer Ramesh further submitted the case of *CE Ling Shipbuilding Sdn Bhd v Hoe Seng Huat Hardware Co (Pte) Ltd* [2003] MLJU 775; [2004] 6 CLJ 145, in which the court held:

> ... it is settled law that the heading 'without prejudice' does not conclusively or automatically render a document so marked privileged, and if privilege is claimed but challenged, the court can look at the document so headed in order to determine its nature (per Parker LJ in *South Shropshire DC v Amos* [1987] 1 All ER 340 at p 344).

FINDINGS OF THE COURT

[22] The law concerning 'without prejudice' communications is provided under s 23 of the Evidence Act 1950 which reads:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be ...

[23] The rule applicable for the said prayers is found under O 41 r 6 of the RHC 1980 which states:

> The court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

[24] In *Halsbury's Laws of England*, (4th Ed) at para 212, which contains a concise digest of the law on 'without prejudice' communications, it is stated that:

> *Letters written and oral communications made* during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made 'without prejudice', *cannot generally be admitted in evidence*.

[25] The rule does not apply to communications which have a purpose other than settlement of the dispute; thus, it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed.

[26] *The privilege, where it exists, covers not only the particular letter itself but also all subsequent parts of the same correspondence on both sides*, even if they are not expressed to be 'without prejudice', unless there is a clear break in the chain of correspondence to show that the ensuing letters are open.

[27] Moreover, it has been held to cover an open letter, followed by another from the same party to the effect that their communications were intended to be 'without prejudice'.

[28] The case of *Field v Commissioner for Railways for New South Wales* (1957) 99 CLR 285 lays down the following proposition. As a matter of policy, the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them.

[29] In the case of *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, Chang Min Tat FJ in delivering the judgment of the Federal Court held as follows:

> *It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted*. This is in order not to fetter but to enlarge the scope of negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

[30] In *Re Jinro (HK) Ltd* [2002] 4 HKC 90 the judge held that it was not necessary for a 'without prejudice' stamp to be expressly applied to the negotiations if it was clear from the surrounding circumstances that the parties were genuinely seeking to compromise the dispute. It was stated in that case that a party claiming without prejudice privilege on communication would

have to show that the communication was made (i) at a time when there was an existing dispute between the parties: (ii) legal proceedings in relation to the dispute had commenced or were contemplated: (iii) the communication was made in a genuine attempt to settle the dispute; the communication was made with the intent that if negotiations failed, it could not be disclosed without the parties consent.

[31] In the case of *Cutts v Head and Another* [1984] 1 All ER 597, the Court of Appeal discussed the 'without prejudice rule' and stated it as follows:

> That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course as much the failure to reply to an offer as an actual offer) may be used to their prejudice in the course of the proceedings.

[32] In the present case, it is an undeniable fact that these said letters contained serious allegations as submitted by the plaintiff's counsel. In the case of *Kitcat v Sharp* (1882) 48 LT 64, the court refused to be obliged by the 'without prejudice rule' when its objective was to suppress a threat if an offer is not accepted. However, this court is of the view that the exceptions referred to in the above case should not be allowed to reduce the protection given to all parties to speak freely about all issues in the litigation when seeking negotiation and, for the purpose of establishing a basis of conciliation alleging certain facts. If the settlement fails, the maker should not be held liable and the allegation made for the purpose of the negotiation should not be received in evidence.

[33] This is especially so in cases pertaining to family matters.

[34] After perusal, this court found that the letter dated 20 November 2008 was a letter from the husband's solicitors to the wife's then solicitors, Messrs Rusmah, Arunan & Associates. The letter contained the husband's proposals on the terms of settlement for a joint divorce petition. In the letter, proposals were made on the issue of custody, care and control of the two children, reasonable access to the party not having custody, maintenance of the children, maintenance of the wife and the division of the matrimonial property at No 18B, Crescent Court, Lengkok Tun Sambanthan, 50470 Kuala Lumpur.

[35] Mr Ebenezer Ramesh submitted that this letter made serious allegations of a quasi criminal nature against the wife; that she had converted for her personal use trust monies entrusted to her by the husband and Mr Ebenezer

Ramesh argued that the wife has no right to object to the inclusion of the letter since it does not constitute genuine negotiations aimed at settlement.

[36] Looking at the letter again, this court found that after alleging conversion of the monies by the wife, the husband in the same breath, proposed that the monies that were allegedly converted by the wife be treated as full and final payment of maintenance to the wife.

[37] In her reply in the letter dated 24 December 2008, the wife contended that all the monies she had received throughout the marriage were for household allowances which she utilised to maintain her two children and herself. She is not agreeable that the monies, which sum is not specified by the husband, to be treated as full and final payment of maintenance to herself and instead proposed a monthly sum of RM1000 as maintenance.

[38] Therefore the contention by Mr Ebenezer Ramesh that the letter made serious allegation of a quasi criminal nature against the wife is not specific since the amount is not specified and the allegation is without any particularisation and tantamount to nothing more than a mere bare allegation. Taking into account that this is a family matter and the dispute is between a husband and a wife who are contemplating divorce, the allegation by the husband made in the light of negotiation for settlement on the issue of maintenance of the wife under the umbrella of 'without prejudice' should be considered privileged communication and as such should not be admitted in evidence.

[39] With regard to the allegation that the wife made serious allegation in her letter dated 24 December 2008 relating to the husband's fitness to have custody and access to the children, this court has perused the letter and found that the wife is agreeable to let the husband have reasonable access if she in return has custody of the children. The serious allegation referred to by Mr Ebenezer Ramesh was in relation to the wife's reluctance, for the time being, to allow the husband to have access to the daughter. This is due to, according to the wife, the daughter taking exception to the husband's friend (a swami), whom the daughter alleged had conducted himself inappropriately. Be that as it may, the wife invited the husband to come up with proposals to help the daughter to resolve her problems and as such has not shut out further negotiations on the matter.

[40] Therefore, from these two letters it can be seen that parties are speaking and negotiating freely about all issues related to the terms of settlement for the filing of a joint divorce petition. As such since the negotiations came to a stalemate, these two letters should be protected by the veil of privilege and should not be received in evidence.

[41] Here, this court would like to refer to the case of *Savings and Investment Bank Ltd v Fincken* [2004] 1 All ER 1125, where the Court of Appeal held:

> An admission in without prejudice negotiations was not to be treated as tantamount to an impropriety unless the privilege afforded to such discussions was itself abused. The public interest in the without prejudice rule was very great, and not to be sacrificed save in truly exceptional and needy circumstances. Mere inconsistency between an admission and a pleaded case or stated position, with the mere possibility that such a case or position, if persisted in, might lead to perjury, did not lose the admitting party the protection of the privilege. It was the fact that the privilege was itself abused that did so. It was not an abuse of the privilege to tell the truth, even where the truth was contrary to one's case.

[42] This court would respectfully agree with the views expressed by Ormrod J in the case of *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201:

> From these cases it seems to me that the principle which emerges is that the court will protect, and ought to protect so far as it can, in the public interest, 'without prejudice' negotiations because they are very helpful to the disposal of claims without the necessity for litigating in court and, therefore, nothing should be done to make more difficult or more hazardous negotiations under the umbrella of 'without prejudice'. I am well aware, coming from the division which I do, that letters get headed 'without prejudice' in the most absurd circumstances, but these letters, in my judgment, are not letters headed 'without prejudice' unnecessarily or meaninglessly. They are plainly 'without prejudice' letters and, therefore, *the court, in my judgment, should be very slow to lift the umbrella of 'without prejudice' unless the case is absolutely plain*.

CONCLUSION

[43] Based on the law set out in the various cases, and after perusing the said 'without prejudice' letters dated 20 November 2008 and 24 December 2008 this court finds that the said letters contained genuine attempts by both the solicitors for the plaintiff and the defendant to settle a family dispute pertaining to custody, care and control of the two children, reasonable access to the party not having custody, maintenance for the children, maintenance for the wife and the division of the matrimonial asset at No 18B, Crescent Court, Lengkok Tun Sambanthan, 50470 Kuala Lumpur. These proposals and attempts were made clearly and categorically in the pursuit of negotiations aimed at a genuine final settlement ie that if the proposed terms are agreeable to both the parties it will culminate in the filing of a joint divorce petition. Since these genuine negotiations did not crystallise into any settlement between the parties, and since the defendant wife did not consent to the inclusion of the said letters ie

that the veil of privilege was not waived by her, the said 'without prejudice' letters are inadmissible and the plaintiff husband is not entitled to produced these letters in evidence herein.

[44] For the foregoing reasons, this court strike out the whole of paras 15.2.3 and 15.2.6 together with said letters dated 20 Novbember 2008 and 24 December 2008 in exh 'INJ4' contained in the plaintiff's affidavit No 1 affirmed by Indran a/l N Jeganathan on 8 June 2009. Prayers 1, 2, 3 and 4 are therefore allowed.

COSTS

[45] On the factual background and circumstances of this case, this court orders the plaintiff to bear the costs of this application.

[46] Application allowed with costs.

Application allowed with costs.

Reported by M Sivabarathi